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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY CRAIG,

Defendant.

) CR No. 08-0329 JSW

)
) MEMORANDUM IN OPPOSITION TO
) MOTION TO SUPPRESS EVIDENCE IN
) VIOLATION OF THE FOURTH
) AMENDMENT

) Hearing Date: September 25, 2008
) 2:30 pm

1 Napa County Sheriff's Department Detective Joseph Jones prepared and submitted an
 2 application for a Search Warrant and supporting Statement of Probable Cause to search the home
 3 of the defendant. This Search Warrant was issued by a neutral and detached state court judge.
 4 The search warrant was based, in part, on information regarding a federal investigation into the
 5 trading of child pornography images and movie files by over 100 email users. The search of the
 6 defendant's home was a valid and proper search under the good faith exception to the
 7 exclusionary rule; the affidavit did not contain any misstatements that would defeat a finding of
 8 good faith or support a *Franks* violation; and the information on which the search warrant was
 9 based was not stale. For all these reasons, the defendant's Motion to Suppress should be denied.

10
 11 **I. FACTUAL BACKGROUND**

12 A. Immigration and Customs Enforcement Lead Information on "Timothy Craig" at
 13 3271 Beard Road, Napa, California and Investigation by Detective Jones

14 In July 2007, Napa County Sheriff's Department Detective Joseph Jones received lead
 15 information from Immigration and Customs Enforcement (ICE) agents concerning a child
 16 pornography investigation in Ohio that had identified an individual identified as Timothy Craig
 17 at 3271 Beard Road, Napa, California as a suspect. *Declaration of Detective Joseph Jones*
 18 (*Jones Decl.*), ¶¶ 5-6. It was this lead information that led Detective Jones to submit and obtain a
 19 search warrant to search the residence of the defendant Timothy Craig.

20 Detective Jones is an experienced law enforcement officer who has specialized training in
 21 computer crimes, including the investigation of crimes involving the manufacturing, possession,
 22 transportation, and distribution of child pornography and has participated in hundreds of child
 23 pornography investigations. *Jones Decl.*, ¶¶ 1-2. Before submitting the search warrant
 24 application to Judge (Ret.) John N. Anton, Detective Jones engaged in further investigation,
 25 learning that the defendant Timothy Craig was a registered sex offender under California Penal
 26 Code Section 290. He further learned that the defendant had a conviction for attempted child
 27 molestation in Los Angeles County and also was arrested in a 2002 prosecution in San Mateo
 28 County that involved the luring of a 13-year old girl, in actuality an undercover police officer

1 from Daly City Police Department. *Jones Decl.*, ¶ 8. In addition, before submitting the search
2 warrant application, Detective Jones reviewed the image that was identified in the ICE lead
3 information as child pornography, Image #223. *Jones Decl.*, ¶ 9. Based on his training and
4 experience, Detective Jones agreed with the ICE agents that Image #223 was child pornography.
5 *Jones Decl.*, ¶ 9. In his analysis, he noted that the photo showed a lewd and lascivious exhibition
6 of the genitals and pubic and rectal areas of two female children, for the purpose of sexual
7 stimulation of the viewer. In his analysis, he considered the setting, focal point of the image, the
8 clothing, what the girls' positioning suggests, and what the image was intended to do for the
9 viewer.

10 B. Detective Jones Submits a Search Warrant Application for Residence of Timothy
11 Craig

12 Detective Jones submitted the Search Warrant and Statement of Probable Cause to Judge
13 (Ret.) John N. Anton, sitting in the Napa County Superior Court of California on August 7, 2007.
14 *Jones Decl.*, ¶ 10. Detective Jones recalls that he submitted the Napa County Search Warrant
15 and Statement of Probable Cause along with an ICE Report of Investigation and the federal
16 warrant with attachments, which have all been submitted as Exhibit B to the defendant's *Motion*
17 *to Suppress*. *Jones Decl.*, ¶ 12. Detective Jones specifically recalls taking the materials in
18 support of the search warrant to the Judge clipped in a fat binder clip. *Jones Decl.*, ¶ 12. Having
19 reviewed all the materials submitted in support of the defendant's Motion to Suppress, Detective
20 Jones recognizes that on Page 4 of the Statement of Probable Cause, in the boxes for "Items
21 attached and incorporated by Reference," there are marks in both the YES and NO boxes and that
22 the NO box appears to be filled in by handwriting. *Jones Decl.*, ¶ 12. Detective Jones does not
23 remember who made the marks in the YES and NO boxes, or when they were made. *Jones*
24 *Decl.*, ¶ 12.

25 Detective Jones does recall that he sat with Judge Anton for 20-30 minutes in his
26 chambers while he reviewed the Search Warrant, Statement of Probable Cause, and Attachments.
27 He recalls that Judge Anton had a few questions, but does not remember the specific questions.
28 *Jones Decl.*, ¶ 13. After Judge Anton reviewed the submitted materials, Detective Jones saw him

1 sign the Search Warrant. *Jones Decl.*, ¶ 14. On August 8, 2007, the day after Judge Anton
 2 signed the Search Warrant, Detective Jones executed the search authorized by the Search
 3 Warrant.

4 C. The Content of the Search Warrant and Statement of Probable Cause Authored By
 5 Detective Jones

6 In the Statement of Probable Cause for the Search Warrant, after setting forth his
 7 experience generally and in the field of child pornography investigations, see Exhibit B to
 8 *Defendant's Motion to Suppress*, p. D000005-06, Detective Jones set forth the following key
 9 facts in the Statement:

- 10 ● In November 2005, ICE agents received information concerning a child pornography
 11 investigation in Royalton, Ohio concerning an individual named Lee Sly and his receipt
 12 of child pornography. Exhibit B to *Defendant's Motion to Suppress*, p. D000006:6-10.
- 13 ● In January 2007, ICE agents learned from a Illinois Police Department that another
 14 individual was involved in trading child pornography over the internet and had received
 15 an image of child pornography from the AOL screen name SIRIOUT3, which was
 16 identified as the account of Lee Sly (the person who had been identified in the Ohio
 17 investigation). Exhibit B to *Defendant's Motion to Suppress*, p. D000006:12-14.
- 18 ● On March 1, 2007, ICE agents served AOL with a search warrant for Lee Sly's email
 19 account. This AOL search warrant revealed "125 other individuals engaged in trading
 20 child pornography (Reference attachment)." Exhibit B to *Defendant's Motion to*
 21 *Suppress*, p. D000006:16-18.
- 22 ● All of the leads developed in connection with this AOL search warrant contained at least
 23 one image or movie file of child pornography that had been received, forwarded, and/or
 24 traded by each target in January and February 2007. Exhibit B to *Defendant's Motion to*
 25 *Suppress*, p. D000006:18-19.
- 26 ● The results of the AOL search warrant indicated that the defendant Timothy Craig was a
 27 suspect in the ICE investigation of Lee Sly's email account. The records further revealed
 28 that an email with the address "Limosdude" was in Lee Sly's sent folder as Message

1 #223. Timothy Craig was identified at 3271 Beard Road, Napa, California address.

2 Exhibit B to *Defendant's Motion to Suppress*, p. D000006:20-24.

3 • From the information received in the investigation, an ICE agent summonsed records
4 from PG&E for the address associated with Timothy Craig - 3271 Beard Road, Napa,
5 California – and confirmed that Craig was listed as the account holder. Exhibit B to
6 *Defendant's Motion to Suppress*, p. D000006:26-28.

7 • Detective Jones further confirmed that Craig was a California Penal Code section 290,
8 registered sex offender. Exhibit B to *Defendant's Motion to Suppress*, p. D000006:30-
9 32.

10 • In listing items to search, Detective Jones characterizes the image in Message #223, as
11 “child pornography.” Exhibit B to *Defendant's Motion to Suppress*, p. D000007:12.

12 • In his training and experience, Detective Jones stated that “individuals engaged in the
13 possession, and distribution of child pornography will store those files in various
14 locations, and on various forms of digital media including computer hard drives, and
15 external storage locations. These individuals will often obtain, trade, and distribute these
16 pornographic images via an internet connection, provided by an Internet Service
17 Provider.” Exhibit B to *Defendant's Motion to Suppress*, p. D000008:27-31.

18 D. The Content of the Federal Investigation Materials

19 Putting aside the issue of whether the federal investigation materials were or were not
20 attached to the Search Warrant Application submitted by Detective Jones, the materials in
21 questions contained the following pertinent material when provided to Detective Jones:

22 • An ICE Report of Investigation (ROI) dated May 18, 2007 identified the 125 leads
23 identified from the search warrant on Lee Sly's AOL email account. The Report detailed
24 that each of the leads contained at least one image or movie file of child pornography
25 received, forwarded, and/or traded by each target in January and February 2007. Exhibit
26 B to *Defendant's Motion to Suppress*, p. D000012.

27 • The defendant Timothy Craig was identified in connection with leads for the San
28 Francisco area. Exhibit B to *Defendant's Motion to Suppress*, p. D0000121.

- Subscriber information received from AOL associated with the email “limosdude” listed an address of 3271 Beard Road, Napa, CA. Exhibit B to *Defendant’s Motion to Suppress*, p. D000044.

II. ARGUMENT

To rule on the defendant’s *Motion to Suppress* and reach the correct result in this case, this Court does not need to address the litany of issues raised by the defendant. It is entirely appropriate to proceed directly to the question of whether Detective Jones acted in good faith in execution of the warrant, without “having to belabor the issue of whether the affidavit stated probable cause.” *United States v. Crews*, 502 U.S. 1130, 1136 (9th Cir. 2007) (citing *United States v. Leon*, 468 U.S. 897, 925 (1984)) (find the good faith rule applicable and declining to address the sufficiency of the warrant); *United States v. Huggins*, 299 F.3d 1039, 1046-47 (9th Cir. 2002)(foregoing a determination of the sufficiency of probable cause and upholding the search under the good faith exception). The United States raises the claim of “good faith” at the outset, to frame this issue in the context that will remove all factual disputes concerning what was and was not attached in the submission to Judge Anton. This argument is not a specious argument, as the defendant insinuates in his *Motion to Suppress*, but rather reliance on well-established and directly applicable Supreme Court and Ninth Circuit jurisprudence.

Defendant went to great lengths to present evidence to this Court that Judge Anton does not believe that the search warrant affidavit submitted by Detective Jones contained the attachments from the federal investigation. While not conceding that these materials were not attached,¹ for sake of this *Memorandum in Opposition*, the United States assumes that the

¹ Although not necessary for a determination on the defendant’s Motion, the United States suggests that certain factors indicate that Judge Anton could have been mistaken in his belief. In the 8 page Search Warrant application and Statement of Probable Cause submitted by Detective Jones - which even the defendant concedes was submitted for review by Judge Anton - the Statement read “This AOL search warrant revealed “125 other individuals engaged in trading child pornography (*Reference attachment*).” Exhibit B to *Defendant’s Motion to Suppress*, p. D000006:16-18 (emphasis added). This reference to an “attachment” within the Statement of Probable Cause supports the position that the federal materials were attached. In addition, Detective Jones recalls that Judge Anton reviewed the materials for approximately 20-30 minutes and that the materials he submitted to Judge Anton were contained in a “fat binder clip.” *Jones*

1 materials, although intended to be attached, were not. Even making this assumption, the correct
 2 result, after reviewing the uncontested materials and considering all applicable case law, is for
 3 this Court to deny the *Motion to Suppress* in its entirety.

4 A. The Search Warrant Should Be Upheld Under the Good Faith Exception

5 The Fourth Amendment exclusionary rule does not “bar the use in the prosecution's case
 6 in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued
 7 by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.”
 8 *United States v. Leon*, 468 U.S. 897, 900 (1984). When a judge finds probable cause, even if the
 9 warrant is lacking in probable cause, a police officer should be able to rely on the judge’s finding
 10 even if the judge is wrong unless the warrant so clearly lacks probable cause that it is obvious to
 11 the officer. *Id.* at 921, 926. The logic underlying the good-faith exception in *Leon* is that
 12 penalizing an officer for a judge’s error does not deter future Fourth Amendment violations. *Id.*
 13 at 921 (“Penalizing the officer for the magistrate's error, rather than his own, cannot logically
 14 contribute to the deterrence of Fourth Amendment violations”). The inquiry in determining the
 15 applicability of the good faith doctrine is not whether there was, in actuality, probable cause, but
 16 instead “whether the affidavit was sufficient to create disagreement among thoughtful and
 17 competent judges.” *United States v. Fowlie*, 24 F.3d 1059, 1067 (9th Cir. 1994)(quotations and
 18 citations omitted).

19 Here, the defendant seeks to use the Declaration by Judge Anton that he obtained and
 20 submitted to this Court as both a sword and a shield. The defendant contends that Judge Anton
 21 only relied upon the Search Warrant, Affidavit, and Statement of Probable Cause submitted by
 22 the Detective Jones. Exhibit D to *Motion to Suppress*, *Anton Decl.*, ¶¶ 7, 10. What the defendant
 23 conveniently glosses over is that Judge Anton, apparently based solely on the Search Warrant,
 24 Affidavit, and Statement of Probable Cause, and not any of the federal investigation materials,
 25

26 *Decl.*, ¶ 12. It is questionable, if not doubtful, that Judge Anton, an experienced state court
 27 judge, would have needed 20-30 minutes to review an 8 page Search Warrant application and
 28 Statement of Probable Cause or that Detective Jones would have used a “fat binder clip” to hold
 these 8 pages. However, none of these facts need to be resolved for this Court to deny the Motion
 to Suppress.

1 found the search warrant to be supported by probable cause and issued the search warrant. What
2 is significant is that in the mind of this “thoughtful and competent judge,” who was proffered by
3 the defendant, the affidavit presented sufficient probable cause for a warrant to issue. *See*
4 *Fowlie*, 24 F.3d at 1067. That the Search Warrant, Affidavit, and Statement of Probable Cause
5 submitted by the Detective Jones may not now, after a detached and removed review, be regarded
6 as containing probable cause does not negate the availability of the good faith exception.

7 Defendant cites many cases in support of his contention that the *Leon* good faith
8 exception is not applicable in the instant case. However, in most of those cases, the Ninth
9 Circuit held that regardless of the purported deficiencies in the search warrant affidavits, or
10 *notwithstanding the deficiencies*, the *Leon* good faith exception rendered the search valid. *Crews*,
11 502 F.3d at 1136-37 (the affidavit provided a “reasonable nexus between the crime [felon in
12 possession of a firearm] and [location to be searched] by demonstrating a sufficient link
13 between” the co-defendants, the firearm evidence, and the location to be searched); *United States*
14 *v. Rowland*, 145 F.3d 1194, 1207 (9th Cir. 1998) (notwithstanding insufficient probable cause,
15 upholding a search warrant for child pornography under the good faith exception because “the
16 affidavit as a whole was not a bare bones affidavit, containing only conclusory statements and
17 completely devoid of factual support); *Fowlie*, 24 F.3d at 1067-68 (“although the affidavit
18 consisted of largely conclusory opinion [connecting the drug activity to the search location], we
19 believe it sufficient, if just barely, to meet the minimal requirements of the good faith
20 exception”); *United States v. Luk*, 859 F.2d 667, 676 (9th Cir. 1988) (the good faith exception
21 applies and suppression is not appropriate where “the executing agents [and affiant] clearly
22 attempted in substance and in procedure to obtain and execute a warrant they believed was
23 valid”).

24 Of the cases cited by the defendant, in only three of those cases did the court dismiss the
25 government’s assertion of good faith. Each of those cases were extremely fact-specific and not
26 applicable here. First, in *United States v. Luong*, the Court held that the search warrant, which
27 relied solely on an unverified and uncorroborated tip of methamphetamine production, utterly
28 lacked any colorable information connecting the suspect to the criminal activity. 470 F.3d 898,

1 903 (9th Cir. 2002). Next, in *United States v. Kow*, the search warrant was determined to be
2 overbroad insofar as it sought “essentially all the documents on the premises” in connection with
3 a corporate tax investigation. 58 F.3d 423, 428 (9th Cir. 1995). The Court held that given the
4 significant overbreadth, no reasonable agent could have relied on it in good faith. *Id.* Finally, in
5 *United States v. Hove*, the police officer sought a warrant for a location without specifying any
6 connection between the location to be searched and the person associated with the alleged
7 criminality (bomb threats) or the evidence to be searched for. 848 F.2d 137, 138-39 (9th Cir.
8 1988). The officer intended to include information linking the suspect to the location to be
9 searched but that information was not contained in the final draft. *Id.* The Court held that the
10 reasonableness of the “good faith reliance” must be determined objectively and that the search
11 warrant, as drafted, failed to show any facts justifying a conclusion that the evidence would be
12 found at that location. *Id.* at 139-140. None of these cases bear on the circumstances of these
13 case and lend support to the defendant’s argument.

14 The good faith exception is not without limitations and would not apply in circumstances
15 in which

16 (1) the affiant mislead the issuing judge by making a false statements or recklessly
17 disregarding the truth;

18 (2) the issuing judge abandoned his role and acted as a “rubber stamp” to the application;

19 (3) the warrant was facially deficient in detail concerning the place to be searched or
20 things to be searched for; or

21 (4) the affidavit is no lacking in “indicia of probable cause” that a reasonable officer
22 could not rely upon it.

23 *Leon*, 468 U.S. at 923-926; *Crews*, 502 F.3d at 1136; *Fowlie*, 24 F.3d at 1067. Here, the
24 defendant claims that the good faith exception does not apply for two of these reasons. He
25 contends that Detective Jones misled the issuing judge with false statements, and that the
26 affidavit was so lacking in probable cause that is could not reasonably be relied upon. As set
27 forth below, neither has merit.

28 //

1 1. *The Statement of Probable Cause By Detective Jones Does Not Contain The False*
 2 *Statements Alleged By the Defendant*

3 In support of his *Franks* argument, the defendant contends that the materials submitted by
 4 Detective Jones contained material misstatements of fact or omissions that affected Judge
 5 Anton's determination in issuing the search warrant. The analysis for assessing whether
 6 Detective Jones made a false statement such that would preclude application of the good faith
 7 exception or independently engaged in a *Franks* violation, as claimed by the defendant, is the
 8 same. Rather than reciting nearly the same argument in two separate section of this
 9 Memorandum, the United States hereby incorporates Section II.B herein in support of its
 10 argument that the false statements alleged by the defendant are not false and would not preclude
 11 application of the good faith exception.

12 2. *Even if Lacking in Probable Cause, the Affidavit Nonetheless Set Forth a*
 13 *Reasonable Basis To Believe That Child Pornography Would Be Found at the*
 14 *Defendant's Home*

15 Putting aside whether the Search Warrant, Affidavit, and Statement of Probable Cause
 16 contained sufficient probable cause for a warrant to issue, the defendant cannot seriously contend
 17 that the affidavit is so lacking in "indicia of probable cause" that a reasonable officer could not
 18 rely upon it. *See Leon*, 468 U.S. at 923-926; *Crews*, 502 F.3d at 1136; *Fowlie*, 24 F.3d at 1067.

19 The facts presented in the materials that were submitted, according to defendant, in the
 20 Search Warrant, Affidavit, and Statement of Probable Cause showed that the defendant, Timothy
 21 Craig, was identified in connection with a large scale child pornography trading investigation.
 22 Exhibit B to *Defendant's Motion to Suppress*, p. D000006:6-10, D000006:12-14. Specifically, in
 23 March 2007, ICE agents served AOL with a search warrant in connection with this investigation
 24 and identified "125 other individuals engaged in trading child pornography (Reference
 25 attachment)." Exhibit B to *Defendant's Motion to Suppress*, p. D000006:16-18. As set forth in
 26 Detective Jones' Statement of Probable Cause, all of the leads developed in connection with this
 27 AOL search warrant contained at least one image or movie file of child pornography that had
 28 been received, forwarded, and/or traded by each target in January and February 2007. Exhibit B

1 to *Defendant's Motion to Suppress*, p. D000006:18-19. Following execution of this AOL search
 2 warrant in the investigation, the investigation revealed that the defendant Timothy Craig was a
 3 suspect in the ICE investigation of Lee Sly's email account, the email that had been associated
 4 with trading child pornography amongst 125 persons. The records further revealed that an email
 5 with the address "Limosdude" was in Lee Sly's sent folder as Message #223. Timothy Craig was
 6 identified at 3271 Beard Road, Napa, California address. Exhibit B to *Defendant's Motion to*
 7 *Suppress*, p. D000006:20-24. After this information was ascertained, an ICE agent summonsed
 8 records from PG&E for the address associated with Timothy Craig - 3271 Beard Road, Napa,
 9 California – and confirmed that Craig was listed as the account holder. Exhibit B to *Defendant's*
 10 *Motion to Suppress*, p. D000006:26-28. Detective Jones further confirmed that Craig was a
 11 California Penal Code section 290, registered sex offender. Exhibit B to *Defendant's Motion to*
 12 *Suppress*, p. D000006:30-32. In his Search Warrant, Affidavit, and Statement of Probable
 13 Cause, in listing items to search, Detective Jones characterizes the image in Message #223, as
 14 "child pornography." Exhibit B to *Defendant's Motion to Suppress*, p. D000007:12. And, to
 15 link the contraband materials to the defendant's address, Detective Jones stated that "individuals
 16 engaged in the possession, and distribution of child pornography will store those files in various
 17 locations, and on various forms of digital media including computer hard drives, and external
 18 storage locations. These individuals will often obtain, trade, and distribute these pornographic
 19 images via an internet connection, provided by an Internet Service Provider." Exhibit B to
 20 *Defendant's Motion to Suppress*, p. D000008:27-31. Finally, that the defendant is a registered
 21 sex offender in California should heighten suspicion that child pornography would be present. In
 22 his affidavit, Jones states that he discovered that Craig is a PC 290 registered sex offender with
 23 the California Department of Justice. The California legislature is clear about registered sex
 24 offenders:

25 Sex offenders pose a potentially high risk of committing further sex offenses after
 26 release from incarceration or commitment, and the protection of the public from
 reoffending by those offenders is a paramount public interest.

27 California Penal Code section 290(a)(1). The fact that the Statement fails to identify the type of
 28 crime that led to the registration requirement does not negate the concern articulated in section

1 290, namely that “sex offenders pose a potentially high risk of committing further sex offenses,”
2 receipt and possession of child pornography being among the offenses categorized as sex
3 offenses.

4 The level of detail attested to by Detective Jones meets or exceeds the “indicia of
5 probable cause” that has previously been held sufficient to uphold application of the good faith
6 exception. Considering all of this information in its totality, the Statement of Probable cause sets
7 forth, at a minimum, “indicia of probable cause” to support application of the good faith
8 exception. This approach has been upheld previously by the Ninth Circuit in the context of a
9 child pornography search warrant. In *United States v. Rowland*, the defendant claimed that the
10 affidavit failed to establish a link between his home and the child pornography or suspected
11 criminal activity involving child pornography. 145 F.3d at 1203. In the *Rowland* affidavit, a
12 postal inspector attested that Rowland had ordered child pornography tapes; had requested that
13 the tapes be sent to his post office box; and that he had been observed collecting mail at the post
14 office box. *Id.* at 1204. The affidavit contained no reference, beyond a cursory statement that
15 Rowland was expected to go to his work and then home after receipt of the child pornography,
16 linking the child pornography to Rowland home. *Id.* Notwithstanding this limited information,
17 the Court held that although there was insufficient probable cause to search the home, there was
18 sufficient indicia of probable cause to uphold the search under the good faith exception. *Id.* at
19 1207-08. *See also Fowlie*, 24 F.3d at 1067-68 (“although the affidavit consisted of largely
20 conclusory opinion [connecting the drug activity to the search location], we believe it sufficient,
21 if just barely, to meet the minimal requirements of the good faith exception”)

22 This same analysis has been followed and used to uphold searches based on the good
23 faith exception to the search warrant in courts throughout the country in similar circumstances.
24 *United States v. Gauthrum*, Cr. No. 5:07-0105, 2007 WL 4788472 (S.D. W.Va. December 27,
25 2007) (upholding search warrant of convicted sex offender based of limited descriptions of
26 images under good faith exception); *United States v. Cordy*, No. 8:06CR321, 2007 WL 675111
27 (D. Neb. March 5, 2007) (even if search warrant for child pornography lacked probable cause, it
28 was sufficient under the good faith exception); *United States v. Laufer*, 245 F. Supp. 2d 503, 511

(W.D.N.Y. 2003) (upholding search warrant without any allegations that defendant possessed child pornography but subscribed to child pornography websites under good faith exception) *United States v. Hernandez*, 183 F. Supp. 2d 468, 479 (D.P.R. 2002) (defendant indicted for possession of child pornography moved to suppress ; court held that even if probable cause was lacking, the officers acted with a good faith reasonable belief that the warrant was not defective).

a. *Description as "Child Pornography" Does Not Defeat Good Faith*

Given the number of pages devoted to his argument that Detective Jones failed to sufficiently describe the images of child pornography, the defendant will no doubt argue in his Reply that the failure to describe the image sufficiently will defeat application of the good faith exception. In his devoted reliance on *United States v. Battershell*, 457 U.S. 1048 (9th Cir. 2006), the defendant misconstrues the law regarding what is the requisite level of description of an image of child pornography in a search warrant and disregards that an image can be described in conclusory terms and still be sufficient for a finding of probable cause. *United States v. Moyer*, 256 Fed. Appx. 61, 63 (9th Cir. 2007) ("magistrate judge may rely on the accompanying conclusory statement by an affiant officer experienced in the investigation of child pornography crimes that the two websites at issue exclusively contain child pornography)(unpublished); *United States v. Smith*, 795 F.2d 841, 848 (9th Cir. 1986) (conclusory statement only that the images in question depicted "sexually explicit conduct" of minors without a more detailed description of the image was not fatal to search warrant for child pornography) *United States v. Grant*, 490 F.3d 627, 633-34 (8th Cir. 2007), cert denied, 128 S. Ct. 1704 (2008) (upholding the sufficiency of a search warrant based on a statement by a computer repair technician to the affiant that the image he saw was child pornography without any further description of the image; alternatively, holding that the description would be sufficient under the good faith exception); *United States v. Diyn*, Crim. No. 3:2006-37, 2008 WL 295942, *7-8 (W.D. Pa. July 18, 2008) (characterizing the images as "child pornography" with all other inferences was sufficient for probable cause determination).. *See also United States v. Pena*, 266 Fed. Appx. 574 (9th Cir. 2008) (upholding search warrant and giving deference to experience of officers in making assumptions as to age of minors depicted). Insofar as a limited description of a child

1 pornography image has been held to be sufficient for determining probable cause, it would most
 2 certainly meet the lower standard under the good faith exception of demonstrating “indicia” of
 3 probable cause.

4 b. Description of a Single Image Does Not Defeat Good Faith

5 The defendant also contends that the fact that only one image was described renders the
 6 search warrant defective on its face. What the defendant disregards is that possession of one
 7 image of child pornography is as criminal as possession of ten images. An affiant has no
 8 obligation to describe numerous images to reach a finding of probable cause or indicia of
 9 probable cause. The fact of the stated images, taken with all the other facts presented by
 10 Detective Jones in his Search Warrant, Affidavit, and Statement of Probable Cause set forth
 11 sufficient indicia, if not probable cause, that child pornography would be found at the defendant’s
 12 home.

13 B. Detective Jones Did Not Make Any False Statements, or *Franks* Violations, In His
 14 Statement of Probable Cause

15 The defendant has not made the requisite threshold showing that is necessary before a
 16 hearing may be held on the sufficiency of the warrant obtained by Detective Jones. The
 17 Supreme Court’s decision in *Franks v. Delaware* established a two-prong test for challenging the
 18 sufficiency of a warrant affidavit. 438 U.S. at 155-56. The Supreme Court decision in *Franks v.*
 19 *Delaware* established a two-prong test for challenging the sufficiency of a warrant affidavit. 438
 20 U.S. at 155-56. The Ninth Circuit has broken these prongs out into five requirements that must
 21 be satisfied before a *Franks* hearing is warranted:

22 (1) the defendant must allege specifically which
 23 portions of the warrant affidavit are claimed to be false;

24 (2) the defendant must contend that the false statements
 25 or omissions were deliberately or recklessly made;

26 (3) a detailed offer of proof, including affidavits, must
 27 accompany the allegations;

28 (4) the veracity of only the affiant must be challenged;

(5) the challenged statements must be necessary to find probable cause.

1 *United States v. Perdomo*, 800 F.2d 916, 920 (9th Cir. 1986) (citing *United States v. Dicesare*,
 2 765 F.2d 890, 895 (9th Cir. 1985).) The *Franks* test applies to intentional omissions as well as
 3 false statements. See *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985).

4 The defendant bears the burden of proof and must make a “substantial showing” to be
 5 entitled to a hearing. See *United States v. Jawara*, 474 F.3d 565, 582 (9th Cir. 2007); *United*
 6 *States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002). The Supreme Court was careful to
 7 limit its decision in *Franks* so that hearings would not become “commonplace” because they are
 8 not “obtainable on a bare allegation of bad faith.” *United States v. Chesher*, 678 F.2d 1353,
 9 1360 (9th Cir. 1982). Merely negligent false statements or omissions do not rise to the level of a
 10 *Franks* violation. See, e.g., *United States v. Potter*, 830 F.2d 1049, 1052 (9th Cir. 1987). Instead,
 11 “[t]here is . . . a presumption of validity with respect to the affidavit supporting the . . . warrant.”
 12 *Franks*, 438 U.S. at 171; see also *United States v. Burnes*, 816 F.2d 1354, 1357 (9th Cir. 1987)
 13 (“In doubtful cases, preference should be given to the validity of the warrant.”) (quoting *United*
 14 *States v. McQuisten*, 795 F.2d 858, 861 (9th Cir. 1986)). Unsupported accusations are not
 15 sufficient. The defendant’s attack on the warrant “must be accompanied by an offer of proof”
 16 that includes “[a]ffidavits or sworn or otherwise reliable statements of witnesses.” *Franks*, 438
 17 U.S. at 171. *Franks* hearings are not permissible “for purposes of discovery or obstruction” but
 18 must be reserved for instances where there are serious and documented concerns regarding the
 19 affiant’s intentional, and not merely negligent, truthfulness. *Id.* at 170.

20 Here, the defendant has failed to show that the statements he contends were false were
 21 “recklessly or deliberately” by Detective Jones in support of the search warrant. Moreover,
 22 contrary to the defendant’s contention, neither of the identified statements is false.

23 1. *The Image Attached to Message #223 Was Child Pornography*

24 The defendant contends that Detective Jones made a material misstatement in describing
 25 the image as “child pornography.” The defendant claims that the image in question “was not
 26 child pornography at all, but instead child erotica protected by the First Amendment.”
 27 *Defendant’s Motion to Suppress* (ECF Docket No. 28), p.39. In making this statement, the
 28 defendant has not only disregarded well-established law but utterly ignores the nature of the

1 photograph. The image in question depicts the lewd and lascivious exhibition of the genitals and
2 pubic and rectal areas of two minor female children. The two female children are partially
3 clothed age-inappropriate lingerie, including g-strings, that although marginally covering the
4 pubic area of the children, reveal the vaginal areas of both children. The children are posed in a
5 sexually suggestive position with their buttocks facing the camera and turning their heads to look
6 at the camera. The focus of the image is on the buttocks and vaginal area of both children. The
7 only conceivable purpose of pose of the children and of this image is for the sexual stimulation of
8 the viewer. The United States will submit this image - which defense counsel has reviewed and
9 which continues to be available to him - under seal and the Court will have an independent
10 opportunity to assess whether Detective Jones made the material misrepresentation alleged by the
11 defendant.

12 The defendant is charged with Receipt and Possession of Child Pornography in violation
13 of Title 18, United States Code, section 2252(a)(1) and (a)(4), which prohibit the receipt or
14 possession of visual depictions of “sexually explicit conduct.” “Sexually explicit conduct”
15 includes “lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. §
16 2256(2)(A)(v). The defendant contends that the fact that the image “displays no breasts of
17 genitalia” renders it child erotica and not child pornography. Presumably, the defendant takes
18 issue with the fact that the genital area of the children depicted in the image is at least partially
19 covered by clothing.

20 The question issue raised by the defendant is whether there can be a lewd and lascivious
21 exhibition of the genital or pubic area of any person where the genitals are covered by an article
22 of clothing. This statutory question must be placed in the context of the Supreme Court’s
23 decision in *New York v. Ferber*, 458 U.S. 747 (1982), which upheld, against a First Amendment
24 challenge, a New York statute criminalizing the distribution of child pornography. In *Ferber*, the
25 Court held that the New York statute served the purpose of “prevention of the sexual exploitation
26 and abuse of children,” which was “a government objective of surpassing importance.” *Id.* at
27 757. Because of the “particular and more compelling interest in prosecuting those who promote
28 the sexual exploitation of children,” the Court held that all child pornography – even that which

1 is not obscene under the standard set forth in *Miller v. California*, 413 U.S. 15 (1973) – was
 2 outside of the scope of the First Amendment and therefore, could be banned. *Ferber*, 458 U.S. at
 3 761. The Supreme Court held that laws banning child pornography withstand First Amendment
 4 scrutiny as long as the conduct prohibited is “adequately defined by . . . applicable law.” *Id.* At
 5 764-65. The Court held that the statutory phrase, “lewd exhibition of the genitals,” was a
 6 statutory definition of child pornography that did not offend the First Amendment. *Id.* at 765,
 7 773-74. The statutory language upheld in *Ferber*, parallels that statutory language in 18 U.S.C.
 8 section 2256, defining “sexually explicit conduct” as encompassing “lascivious exhibition[s].”²
 9 The federal statutory language further explains that its prohibitions extend beyond the genitals to
 10 include the “pubic area.”

11 Lascivious is defined as “[t]ending to excite lust; lewd; indecent; obscene; sexual
 12 impurity; tending to deprave the morals in respect to sexual relationships; licentious.” Black’s
 13 Law Dictionary 882 (6th Ed. 1990). The Third Circuit concluded that the term “lascivious
 14 exhibition” “means a depiction which displays or brings forth to view in order to attract notice to
 15 the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the
 16 viewer.” *Knox*, 32 F.2d 733, 745 (3rd Cir. 1992). This definition does not include any
 17 requirement of nudity.

18 The Tenth Circuit has held that, lasciviousness is not a characteristic of the child
 19 photographed, but of the exhibition which the photographer has arranged the photograph to suit
 20 his “peculiar lust.” See *Knox*, 32 F.3d at 747; *United States v. Wiegand*, 812 F.2d 1239, 1244-45
 21 (9th Cir. 1987). Accordingly, lasciviousness remains an inquiry for the finder-of-fact, that does
 22 not involve an inquiry concerning the intent of the subject. This interpretation is consistent with
 23 the plain language of the statute and furthers Congress’ intent in eradicating the pervasive harm
 24 children experience when subject to posing for pornographic purposes. *Knox*, 32 F.3d at 747.

26
 27 ² The circuits have uniformly treated the terms “lewd” and lascivious” as material
 28 equivalents. See e.g., *United States v. Frabizio*, WL 2351263 (1st Cir. 2006) (internal citations
 omitted).

Several Circuits, including the Tenth Circuit have adopted, what has come to be referred to as the “*Dost* test” when interpreting the term “lascivious exhibition.” See *United States v. Dost*, 636 F.Supp. 828 (S.D. Cal. 1986); *United States v. Wolfe*, 890 F.2d 241, 245 (1989); *United States v. Grimes*, 244 F.3d 375 (5th Cir. 2001); *United States v. Carroll*, 190 F.3d 290, 297 (5th Cir. 1999); *United States v. Knox*, 32 F.2d 733, 746 fn. 10 (3rd Cir. 1992); *United States v. Rubio*, 834 F.2d 442, 447-448 (5th Cir. 1987); *United States v. Nolan*, 818 F.2d 1015, 1019 n.5 (1st Cir. 1987). The *Dost* factors suggest, that when a finder-of-fact determines whether an image is a “lascivious exhibition,” six factors should be considered:

- 1) whether the focal point of the visual depiction is on the child’s genitalis or pubic area;
- 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
- 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- 4) whether the child is fully or partially clothed or nude;
- 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the view.

Grimes, 244 F.3d at 380 (internal citations omitted).

Notably, the *Dost* factors, used by courts for the last twenty years to help define “lascivious exhibition,” specifically include in its considerations, “whether the child is fully or partially clothed or nude.” Since its inception, the *Dost* factors have demonstrated that the level of clothing is but one of several factors for the finder-of-fact to review when it considers whether an image is child pornography. As the Third Circuit noted in *United States v. Villard* – decided five years prior to its decision in *Knox*:

[A] photograph of a naked girl might not be lascivious . . . but a photograph of a girl in a highly sexual pose, dressed in hose, garters, and a bra would certainly be found to be lascivious.

Villard, 885 F.2d 117, 124 (3rd Cir. 1989). .

1 In 1994, in *Knox*, the Third Circuit held that the plain language and legislative history of
 2 sections 2252, and 2256, demonstrated that Congress did intend to reach to the non-nude
 3 lascivious exhibitions of the genitals and pubic area. Subsequently, the Eighth Circuit in *United*
 4 *States v. Horn*, 187 F.3d 781, 780 (8th Cir. 1999), upheld a conviction of the defendant based on
 5 image the jury found lascivious. The court specifically held:

6 In particular, we believe that when the child is nude or partially clothed, when the focus
 7 of the depiction is the child's genitals or pubic area, and when the image is intended to
 elicit a sexual response in the viewer, the depiction is lascivious."

8 *Id.* Other Circuits have followed suit and held that lascivious exhibition" does not require full or
 9 partial nudity. *United States v. Boudreau*, 250 F.3d 279, 282-83 (5th Cir. 2001); (citing *United*
 10 *States v. Carroll*, 190 F.3d 290, 298 (5th Cir. 1999); *vacated in part, reinstated in relevant part*
 11 *by*, 227 F.3d 486, 488 *5th Cir. 2000) (per curiam).

12 In an unpublished decision, *United States v. Campbell*, 81 Fed. Appx. 532 (6th Cir. 2003),
 13 the Sixth Circuit upheld the jury's conviction of a defendant for violations of child pornography
 14 statutes involving non-nude images of preadolescent girls. The court concluded that the images
 15 met the *Dost* standards and included a lascivious exhibition of the genitals:

16 Those [images] are not completely nude [the girls] are found wearing lingerie or
 17 stockings and garters-inappropriate attire for girls of their age. Many of the depictions are
 18 sexually suggestive, with girls posing unnaturally, prompting focus on the genital area.
 19 Moreover, most of the images seem intended to elicit a sexual response in the viewer.
 20 That intent is evidenced by how the child poses (on her back with legs slightly spread), at
 21 the angle of the shot (taken from near the child's feet, while she is lying on her back), and
 22 the child's facing expression (smiling while looking into the camera). These same
 characteristics support a finding that the images suggest a sexual coyness or willingness
 to engage in sexual activity. In short, Campbell's images involved all of the *Dost* factors
 to some extent, and a rationale juror could have found beyond a reasonable doubt that
 they depicted sexually explicit conduct.

23 81 Fed. Appx. At 536-37.

24 More recently, in *Grimes* the Fifth Circuit concluded, as a matter of law, that nude
 25 photographs of young girls, with the images of their genitalia pixilated out of the photo, was a
 26 "lascivious exhibition" within the meaning of section 2256. The court rejected *Grimes'* challenge
 27 to the sufficiency of the evidence and noted, "that the producing of these visual depictions
 28 involved the use of minors engaging in sexually explicit conduct and that the visual depiction

1 captured that activity.” 244 F.3d at 380. In sum, the plain language of the statute contains no
2 requirement that the images of child pornography must include nudity to be prohibited.
3 Additionally, courts and commentators that have reviewed this statutory language over the last
4 twelve years have consistently concluded that “lascivious exhibition” does not require that the
5 child be nude.

6 The image in question falls squarely within the statutory definition of “lewd and
7 lascivious” exhibition and therefore Detective Jones description as “child pornography” cannot
8 be regarded as a false statement.

9 2. The Statement That Craig Was a Suspect Was Not False

10 The defendant also claims that Detective Jones lied in stating that the

11 AOL search warrant indicated that Timothy Craig was a suspect in this
12 investigation. The records indicated the following:
13 “Limosdude” - Tim Craig, 3271 Beard Road, Napa, CA, 94558, (707) 257-1282.

14 *Defendant’s Motion to Suppress* (ECF Document No. 28), p. 36. Then, after identifying this
15 purported “lie,” defendant engages in convoluted extrapolations as to how and why this
16 statement was a lie, alleging that the statement connotes a relationship between Lee Sly,
17 the email sender, and the defendant. The defendant’s analysis is, at best, a tortured effort
18 to create a lie where none exists. Detective Jones laid out the results of the AOL search
19 warrant. To the extent this information was not presented as clearly as it could have been,
20 a less than clear statement about an investigation does not render it a lie, and certainly not
21 the material misstatement that the defendant must show to prevail on a *Franks* hearing.

22 . In any event, even if the defendant successfully identified a “lie” in the Statement of
23 Probable cause on either ground, he has failed to allege that the false statements were
24 “deliberately or recklessly made.” *See Perdomo*, 800 F.2d at 920 (9th Cir. 1986). Allegations of
25 falsity alone are not sufficient to make out a *Franks* violation. For these reasons, the defendant’s
26 *Franks* argument fails.

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28 //

C. An Eight Month Lapse Does Not Render a Search Warrant Stale

The federal search warrant from the information on which Detective Jones' Statement of Probable Cause was based was an investigation that spanned from January 2007 through March 2007. Exhibit B to *Defendant's Motion to Suppress*, p. D000006:12-14; D000006:16-18. Detective Jones sought and obtained the search warrant for the defendant's home on August 7, 2007. *Jones Decl.*, ¶ 10. The defendant incorrectly argues that this five to possibly, eight month, lapse renders the warrant stale.

"The test for judging the timeliness of a search warrant is whether there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." *United States v. Gann*, 732 F.2d 714, 722 (9th Cir. 1984). Staleness is a fact-specific inquiry on a case by case basis. Information in support of a warrant is not considered to be stale if "there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." *United States v. Lacey*, 119 F.3d 742, 745-46 (9th Cir. 1997) (considering staleness in the context of a computer search warrant for child pornography).

In the specific context of child pornography investigations, the Ninth Circuit has consistently held that search warrants based on information that predated the warrant by as much as one year was not stale. "If a line must be drawn in child pornography cases, I find that the line is one year absent evidence of ongoing or continuous criminal activity." *United States v. Greathouse*, 297 F. Supp. 2d 1264 (9th Cir. 2003) (suppressing search warrant based on limited information that was thirteen months old). Furthermore, in *United States v. Lacy*, the affiant testified as to events that predated the warrant by 10 months. He also stated that collectors maintain images due to high value and store in secure place, typically their homes. The Court noted that it was unwilling to assume that materials are kept indefinitely but that given the nature of the crime, there was sufficient evidence to believe that the evidence would still be at the house upon execution of the search warrant. 119 F.3d at 745-46; *see also United States v. Roby*, 27 Fed. Appx. 779, 780 (9th Cir. 2001)(gap of eight months between the of the download of child pornography detailed in the warrant and execution of the warrant did not render the warrant stale;

1 holding that “the mere lapse of substantial amounts of time is not controlling in a question of
2 staleness); *United States v. Hay*, 231 F.3d 630 (9th Cir. 2000)(relying on Lacey, the court held
3 that a search warrant based on six month old information was not stale). *N.b. United States v.*
4 *Chase*, CR 206-CR-0065-PMP-PAL, 2006 WL 2347726 (D. Or. August 9, 2006) (upholding a
5 search warrant based on information that was between one and three years old; the affiant
6 attested to continuing sexual offenses against children beginning in 1996; that the defendant had
7 given a third party child pornography disks in 2001 and 2002; that the defendant was known to
8 associate with young boys in 2004, after being registered as a sex offender). These cases do not,
9 as defendant contends, require “expert testimony” to either validate the affidavit or “cure” any
10 staleness issues. For these reasons, the defendant’s staleness challenge fails.

11 III. CONCLUSION

12 For the foregoing reasons, the Defendant’s Motion to Suppress should be denied in all
13 respects.

14
15 JOSEPH P. RUSSONIELLO
16 United States Attorney

17
18 DATED: August 26, 2008

19 /s/
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21 NATHANAEL M. COUSINS
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